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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF IN BEHALF OF INTERVENER, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

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Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF ON BEHALF OF INTERVENER.

This is an appeal from the decree and judgment of a statutory District Court, whose opinion is reported 48 F. Sup. 432, dismissing suit of appellants to set aside an order and reports of the Interstate Commerce Commission, 31 M. C. C. 193; 34 M. C. C. 641.

QUESTIONS PRESENTED.

Intervener accepts or endorses the statement of questions presented, as well as the statement of jurisdiction and reference to statutes involved set forth in brief for appellees, the United States and the Interstate Commerce

Commission; and it adopts the summary of argument in the brief for appellees.

Intervener suggests, however, that the immediate or primary question before this Court is whether the decree and judgment of the statutory District Court should be affirmed, or whether there is merit in any of appellants' assignments of error.

The ultimate question is the validity of the assailed order of the Commission. On that question neither appellants nor appellees appear to have suggested to the Court that under the statute[1] the burden of proof was on the respondent motor carriers to justify the propriety of the proposed rates and minimums under suspension, a requirement of law which calls for examination of the testimony before the Commission to disclose whether there was such substantial evidence as required the Commission to hold that the proposed rates had been justified by respondents.

INTERVENTION.

The appearance of The National Industrial Traffic League as intervener[2] is under order of the Court, entered December 6, 1943, granting motion of intervention.

As recited in its motion, the League participated in the proceeding before the Commission and was interested in the subject matter of those proceedings, so that under the statute[3] it was entitled to appear as party in the suit in

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[1] Section 216(f), Motor Carrier Act, Part II, Interstate Commerce Act, Title 49, U.S.C., Sec. 316.

[2] Hereinafter for brevity referred to as the league, or as intervener.

[3] Title 28 U.S.C., Sec. 45a; Judicial Code Secs. 212-213, amended.

the court below. Unfortunately, the League had no notice of the proceedings in the District Court until after argument was had before the three judges and consequently did not appear in the Court below. The findings, decree and judgment are satisfactory to intervener; the League supports appellees in submitting that the appeal should be dismissed and the decree and judgment of the lower Court affirmed.

SUPPLEMENTAL STATEMENT OF FACTS.

Intervener adopts and reaffirms the statement of facts appearing in brief for appellees as both correct and complete, *excepting* these relatively minor additions:

a. In the proceedings before the Commission, there was substantial opposition from shipper interests to the proposed rates and minimum weights.[1] The brief of appellants unfortunately may convey an erroneous impression in the statement on page 3.

> "No shippers sought suspension of the operation of the new tariff schedules and none submitted evidence or took any part in the public hearing. When the full Commission reviewed the case it allowed a representative of Linoleum Manufacturers (not parties of the proceeding) the privilege of participating in the oral argument."

The full record in the Commission is not included in the printed transcript of record before this Court; in particular there is omitted the order of suspension and investigation, by which the Commission initiated the proceed-

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[1] While no shippers attended the hearing of this individual case (R. 49) the linoleum shippers and the League were active in the series of cases involving motor carrier minimums; and the League and linoleum manufacturers participated in the oral argument of this proceeding (R. 21-27).

ing, and the transcript of oral argument.[5] If these were included in the record before the Court, reference thereto would verify the objections and participation of linoleum manufacturers and of the League on behalf of shippers generally.

b. The suspended rates and minimums did not represent general changes by principal members of appellant associations but represented individual rates between certain points on behalf of certain motor carriers; and these were published in a schedule of their tariff publishing agent,[6] through an association arrangement. This fact is significant, bearing on appellants' objections to the Commission's report as based on *policy* instead of law and facts.

SUMMARY OF ARGUMENT.

1. The findings and conclusions of the Court below are amply supported by the record before the Court. The assailed order of the Interstate Commerce Commission was regularly made and entered, under an order of investigation, after full hearing, on an ample record of pertinent and material testimony. The order is not shown to have been invalid in substance or in law.

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[5] Ordinarily the transcript of oral arguments is not considered as part of the record in Commission proceedings; in this instance the oral argument is significant because of factual admissions of counsel and the light thrown on circumstances of this as a test case.

[6] The Commission suspended schedules filed by Agent Everett H. Russell from 14 eastern origins to 34 western destinations (R. 10), subject to minimum weights of 30,000 and a general classification-exceptions rating embodying a minimum of 20,000 (R. 10). Only one motor carrier indicated sufficient interest to offer any testimony (R. 53), and other member motor carriers were maintaining the lower rates on the 18,000 pound minimum (R. 59).

2. While appellants assail the Commission's decision as erroneously predicated on adoption of a policy, in fact the Commission simply stated doctrines and applied recognized rate-making principles, entirely within and in consonance with the national policy of transportation and the rate-making rule declared by the Congress.

3. It is essential to successful administration of the Interstate Commerce Act that there shall be continuity in the doctrines and rate-making principles observed by the carriers and applied by the Commission. The announcement of general principles and doctrines amounting to statements of administrative policy contravenes no duty and exceeds no limitation on the authority of the Commission. Such statements of rate-making "policy" are commonly sought by carriers and shippers. The objections of appellants to the supposed invalidity of the Commission's statements of policy in the assailed report reflects their disappointment that the Commission did not adopt a policy that suits the views and desires of appellant associations.

4. The doctrines and principles stated in the Commission's decisions are harmonious with long-established principles followed in regulating railroad rates and heretofore found by the Commission to be properly applicable to the facts and circumstances of highway transportation under Part III.

ARGUMENT.

I.

The decree should be affirmed.

The Court below had before it the text of the decisions and order (R. 20) of the Commission and the transcript of testimony upon which the Commission's decisions rested. (R. 49-65) Thereupon the Court entered four numbered findings (R. 39), reciting the status of the parties, describing the essence of the assailed decisions and holding that the order was entered after full hearing and adequate argument; that the Commission's findings were supported by substantial evidence and were adopted by the Court as its own.

Thereupon the Court below stated six conclusions of law (R. 40) to the general effect that the assailed order was justified by law and the evidence and constituted a valid exercise of the Commission's power to act; that the findings of the Commission were sufficient to sustain and warrant the order; that these findings were sustained by substantial evidence; that the construction of the law by the Commission was correct and that relief should be denied for want of equity.

There is in these findings and conclusions of the Court below no error or apparent misconception of law, or failure to consider the facts.[7] If this Court will examine

[7] There is no assignment of error as to facts; appellants' brief herein refers (p. 7) to "assignments of errors of law" only; and in appellants' statement of points relied on (R. 65) there is simply the unusual suggestion that the lower court's opinion "was not in any respect responsive to the contentions made by the appellants concerning the features of illegality" of the Commission's order.

the entire transcript of testimony received by the Commission (Rec. 49-65) intervener submits there will be discovered no basis for concluding that there was any lack of full hearing, any restriction on the opportunity of the respondent carriers to present any and all evidence they chose, and that the evidence offered falls far short of meeting any reasonable test of the burden of proof on respondent carriers to establish the propriety of the rates which the Commission had suspended. The opinion (R. 41), written by Hon. Augustus N. Hand, Circuit Judge, concurred in by District Judges Edward A. Conger and John W. Clancy, manifestly disposes of appellants' main theory and argument, although not mentioning refinements of reasoning in the ingenious presentation of plaintiff below The Commission's reports indicate no deviation from the substantive provisions of the statute, amounting to error of law.

Having in mind the doctrine applied by this Court that the judicial branch shall not substitute its judgment or discretion for that of the administrative tribunal[8] and in addition the support that this Court has given to the work of the Interstate Commerce Commission as an expert tribunal of enlightened judgment and experience, and with national vision,[9] this intervener suggests that nothing appears on the face of the record which would have warranted the Court below in holding that the Commission erred in striking down a tariff providing minimum weights to govern rates for transportation, 50 per cent higher than

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[8] *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658.

[9] *Standard Oil Co.* v. *United States*, 283 U. S. 235, 239; *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 95; *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282.

the maximum legal load limit of the vehicles of respondents, as unreasonable and otherwise unlawful.[10]

Therefore, the decree and judgment of the District Court should be affirmed.

II.

The order is not based on a declared policy.

Examining somewhat carefully appellants' assignments of error (R. 45) and the statement of points relied upon by the appellants (R. 65) in the light of the brief offered by counsel in behalf of appellants, it appears that the Commission's decisions are attacked mainly as having been predicated on the adoption of a policy.[11] Appellants regard it as beyond the Commission's authority to decide cases on policy and, furthermore, regard the policy supposedly reflected in the assailed decisions as erroneous.[12]

While it is true there are expressions and announcement of policy in the decisions herein of Division 3 and the full Commission, yet as a matter of fact the Commis-

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[10] The formal findings of the Commission (R. 31) are buttressed by ample recitals of facts developed of record (R. 30) and the court below quite properly adopted as its own (R. 40) the findings of unreasonableness and unjust discrimination, as a whole, embodied in the Commission's report.

[11] The principal feature of argument in appellants' brief (p. 12) is entitled "The Commission's order is invalid because the conclusion of illegality was based only upon its own declared policy." See No. III of statement of points relied upon (R. 66).

[12] Appellants' true object seems to be the following of a policy by the Commission of permitting motor carriers to adopt railroad freight rates, as such; asserting as a proposition of law that motor carriers, when meeting a subnormal railroad rate, may attach the same incidents of minimum weight requirements as attached to the railroad rate.

sion simply stated doctrines and applied recognized rate-making principles which are entirely within and in consonance with the national policy of transportation as declared by the Congress.

If the decision is examined not as a test case but more narrowly as to the validity of the order itself (R. 20), requiring cancellation of the proposed or suspended schedules, it will be discovered very quickly that there was no substantial evidence which would have justified any different order. For under the facts shown by the evidence the proposed minimum was plainly unreasonable and creative of unjust prejudice. At least, it was clearly within the administrative judgment of the Commission so to determine upon the facts, which is just what Division 3 did in the first decision, 31 M.C.C. 193. (R. 20)

WHY THE COMMISSION EXPRESSED A POLICY.

The question is natural, why did the Commission use the words "we shall follow the policy" and "we adopt as a policy" instead of merely restating a principle theretofore stated? The answer is that they were in fact responding to requests for making clear and final the principle, or policy, to be followed in considering minimum weights of motor carriers, and such requests were as much from the motor carriers as from shippers.

Indeed, it seems that appellants are not entirely candid when attacking the decision on the ground of announcement of policy by the Commission as controlling circumstance, because in essence it was the appellants themselves who were seeking an expression in this test case of such policy. To give the Commission the benefit of the circumstances under which it applied its expert knowledge and enlightened judgment, to consider what prompted its ex-

pression of a settled policy, the Court should have in mind matters of history that are not reflected in the record submitted by appellants as constituting the printed transcript. Confessing that counsel for intervener should not go outside the printed record for facts determinative of this proceeding, yet it is entirely fair to invite the Court's attention to these circumstances:

APPELLANTS SOUGHT A TEST CASE.

Under date of February 27, 1942, the three associations or carrier bureaus, appellants herein, including five others, joined in presenting printed petition to the Commission for reargument and reconsideration of eleven cases theretofore decided by Divisions 2 and 3 of the Commission, including the case presently involved—I. & S. M-1216. The gravamen of this petition was that the Divisions had been deciding cases involving "minimum weights exceeding the legal carrying capacity of the vehicles ordinarily used" along lines detrimental to the trucking interests and unsatisfactory to said petition, wherefore a general argument of the cases should be had.[13] Quite obviously the end sought was the determination of a principle or enunciation of a doctrine, amounting to a statement of policy, within the terms of the national transportation policy declared by the Congress and in line with the substantive provisions of the Act. The petition was rejected by the Commission on April 6, 1942, on the ground that the petitioners were not parties of record to all of the proceedings, and many of the grounds relied upon were not matters of record in the proceedings. Coincidently, and as part of

[13] This petition is reported in *I.C.C. Practitioners Journal* for March, 1942, Vol. IX, No. 6, p. 604, as item 1, with comments by Mr. J. Ninian Beall, who was of counsel for appellants before the Commission herein.

the same action, the Commission reopened the present proceeding, I. & S. M-1216, (being one of the proceedings included in said petition) for oral argument on May 8, 1942. This patently was the making of a test case to afford opportunity for a statement of principle, announcement of doctrine, or policy, responsive to the urgings of the motor carrier associations or bureaus, who are appellants herein.

Parenthetically, the prior decisions in which the Division had established the principle regarded by the motor carrier associations as unsatisfactory and listed in appendix to their aforesaid petition were as follows:

Iron and Steel from Pittsburgh and Aliquippa, Pa. to Baltimore, Md., 21 M.C.C. 791.
Carpets and Carpeting from Official Territory, 237 I.C.C. 651.
Whiskey from Cincinnati, 22 M.C.C. 81.
Peanut Butter from Montgomery, 22 M.C.C. 375.
Paper, Mechanics Falls, to Boston, 28 M.C.C. 196.
Petroleum Products, Bolivar, N. Y., to Farmer's Valley, 28 M.C.C. 527.
Beans, Billings, Mont., to South Dakota, 30 M.C.C. 125.
Seeds, Montana, Iowa, Minnesota and Wisconsin, 30 M.C.C. 547.
Rugs and Matting, East to Western Trunk Line Territory, 31 M.C.C. 193,
Activated Carbon, etc., Texas to Kansas City, 31 M.C.C. 697.

The aforesaid petition and the orders are not parts of the printed transcript of record before this Court, but the circumstances are not to be controverted and should be considered as throwing light on the third ground urged by appellants (R. 66) and the argument made under corresponding subject A of argument in the brief for appellants (p. 12) that "the Commission's order is invalid because the conclusion of illegality was based only on its own declared 'policy'".

THE POWER TO DETERMINE POLICY.

Broadly speaking, this intervener admits that the Commission is without power to determine national or legislative policy.[14] The carriers are entitled to initiate rates and adopt such policies of rate-making as to them seem wise, without substitution of a policy dictated for them by the Commission.[15] But this is not to admit what seems to be appellant's view, that (within the substantive rules laid down and the national policy declared by the Congress in the Interstate Commerce Act and any supplemental legislation) the Commission is without power to announce its policies of administration, in terms amounting to nothing more than the statements of rate-making principles and detailed doctrines.

The words of announcement of a policy found in the present decisions amount to no more than such definite expression of a doctrine and principle, entirely within the Congressional declaration of national policy and rate-making rule.[16]

Intervener does not differ at all with Mr. Commis-

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[14] *Cincinnati, New Orleans & Texas Pacific* v. *Interstate Commerce Commission*, 162 U. S. 184; *Central R. Co.* v. *United States*, 257 U. S. 247.

[15] *Interstate Commerce Commission* v. *Chicago Great Western*, 209 U. S. 168; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433; *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515.

[16] The rate-making rule expressed in Section 216 (i) contemplates that the Commission shall give consideration, among other factors, to the inherent advantages of transportation by the particular carriers, to the effect of rates upon the traffic of such carriers and to their revenue needs. The declaration of national policy forms a preamble to the Interstate Commerce Act; title 49 U. S. Code, Secs. 27, 301 and 901.

sioner Lee in his statement of dissent in the final decision (R. 32) to the effect:

> "The determination by us of whether a motor carrier rate, or the minimum to which it is subject, is unreasonable or unjustly discriminatory must be based not upon the application of an arbitrary policy, but upon careful consideration of all the circumstances and conditions shown to affect the transportation."

And there is no reasonable implication that the report of the Commission offends that thought, for the decision indicates the transportation facts which were considered and the expression of policy amounts to no more than a definite statement of settled opinion of principle and doctrine. We are thinking of the ordinary dictionary definitions: *Doctrine*, is a principle or position or a body of principles; *Principle*, is a fundamental law or doctrine from which others are derived or on which others are founded, a general truth, a settled rule of action; *Policy*, is a settled or definite course or method followed by a government, institution, person or individual.

That the appellants themselves were seeking from the Commission what amounted to an administrative declaration of rate-policy, further, what the appellants regard as the true policy, is indicated by this short quotation from the argument of counsel (Mr. Cotterill) before the Commission in the underlying case as recorded on p. 35 of the typewritten transcript:

> "Division 3 announced the conclusion that the suspended rates were unlawful because unreasonably involving a minimum weight greater than the loading involved, and accompanied that by an announcement that, as a matter of policy, henceforth such would be the view of this Commission in any similar situation, and in substance, saying that it was consistent with a series of decisions by Divisions 2 and 3 of general like import although varying somewhat in the attributed reasons in the findings of illegality.
>
> "Now, the motor carrier industry is here urging your

Honors to look at the situation differently, as a full Commission, and we rest our case on a proposition of law essentially which is that motor carriers, when lawfully meeting a subnormal railroad rate, may attach to their rate the same incidents as are attached to the railroad rate in the matter of the minimum weight requirement."

III.

The desirability of established doctrines.

While perhaps going beyond the scope of necessary argument in this case, we presume it will be recognized that it is essential to successful administration of the Interstate Commerce Act that there shall be pronouncements of principles of rate-making and rate determination by the Commission whereby carriers and shippers alike may be governed so that there shall be some continuity of decisions and of application of principles and carriers may know what is to be regarded as proper measures and tests of validity, fairness and reasonableness.

For instance, under Part I governing railroads the principle has long been recognized that car-mile earnings afford sounder and more satisfactory test of the reasonableness of carload rates than is afforded by ton-mile earnings thereon.[17] When the Commission announces that principle with finality it is in a sense stating its policy; and such statements of policy ordinarily are unchallenged, so far as any claim that such lie beyond the authority of the Commission.

The difference is very great between declarations by

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[17] *Luten Bridge Co.* v. *Atlantic Coast Line R. Co.*, 123 I.C.C. 612; *Interstate Amiesite Co.* v. *Akron C. & Y. Ry. Co.*, 173 I.C.C. 456; *Piedmont Corp.* v. *G. & N. W. R. Co.*, 153 I.C.C. 751; *United States Graphite Co.* v. *B. & O. R. Co.*, 169 I.C.C. 518.

the Commission as to matters of national policy and substantive principles of law, (properly reserved to the Congress and beyond any proper function of the Commission), on the one hand, and those statements of rules of conduct, so to speak, reflecting merely detailed principles of rate making and of rate determination, which the Congress has left to the Commission.

Appellants rely strongly on the language used by Mr. Justice Black in his dissenting expression in *Interstate Commerce Commission* v. *Inland Waterways Corporation*, decided June 14, 1943. That was a situation where it seemed Congress had declared the national policy favorable to water transportation and that the Commission was seeking to adopt a policy of its own not in harmony with the Congressional declaration.

Intervener will go the appellants one better by citing the decision in *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 86 Law ed. Adv. 627. While we find no precise language therein amounting to denial of right of the Commission to express its policy, the decision as a whole plainly condemns the Commission's action in the particular case as having been pursuant to an adopted policy of the Commission. Such policy related to regulation of common and contract carriers and involved applying tests in conflict with those provided in the statute. No policy of the Commission, of course, can infringe upon or go beyond the principles, powers, and provisions of Congressional enactments.

The fact remains that Congress has broadly legislated in Sections 1 and 216 of the Act, for illustration, to the effect that all rates and charges shall be just and reasonable. It has not undertaken to define or state the proper principles of transportation rate making or the circum-

stances and factors to be employed in carrying out the mandate that the Commission shall strike down any rate which is unreasonable. Such details of principle and rate-making doctrines it is certainly desirable shall be set forth in Commission decisions which, when consistently followed amount to adopted policies.

IV.

The doctrines stated and principles applied by the Commission.

The principle and doctrine especially stated by the Commission and assailed by appellants is that a minimum weight to govern truckload rates of motor carriers and which exceeds the physical and legal limits of capacity of the trucks used is to be regarded as unreasonable in the absence of showing of operating economies. This does not purport to be a rule of law; it is stated as a matter of adopted policy in the following paragraph of the first decision, by Division 3 (R. 18):

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum We adopt as a policy the condemnation as unreasonable of

> a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527. *Coal, Wyoming to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

The foregoing paragraph from the report of Division 3 was quoted and reaffirmed in the final decision by the full Commission (R. 23) and therein the full Commission made the following further statement (R. 29):

> We are mindful of the fact that we approved certain rates subject to a minimum weight of 30,000 pounds on linoleum in *Carpets and Carpeting, Official to Southern Territory, supra*. However, our report therein expresses our doubt as to the propriety of establishing a minimum of 30,000 pounds in connection with the proposed column 45 basis because it would require more than one unit of equipment to transport 30,000 pounds. That report was issued over a year ago and now we are convinced that not only were our doubts as expressed therein well founded, but that for the future we shall follow the policy announced in the prior report herein with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers.

The foregoing statements are embodied in the opinion by Judge Hand (R. 41). Each of the statements of principle and each of the conclusions stated in these paragraphs is correct and is in accordance with repeated rulings of the Commission in prior cases.

In substantiation of these assertions, intervener now brings to the Court's attention various decisions of the Commission stating principles to be applied in measuring

proper truckload minimums, *i. e.*, the specified least quantity which a shipper must tender through the motor carrier before it is entitled to a lower rate than that fixed for single package or less-than-truckload shipments (R. 29, lines 26-30).

ESTABLISHED PRINCIPLES GOVERNING TRUCKLOAD MINIMUMS.

That there is nothing really new or revolutionary or surprising in the doctrine announced in the assailed reports of Division 3 and the full Commission herein, will be readily seen from a review of numerous previous decisions of the Commission and divisions thereof.[18]

In *Coal from Wyoming to Idaho Falls, etc.*, 29 M.C.C. 335, Division 2, disapproved coal rates proposed by motor common carriers subject to minimum weights of 100,000 or 200,00 pounds, reflecting a situation of railroad competition. It prescribed a minimum weight of 20,000 pounds and in reaching its conclusion said:

> "It is a common practice for carriers to assure themselves adequate revenue by requiring a minimum weight in connection with a particular rate. We have often found minimum weights of rail carriers to be unreasonable when in excess of the loading capacity of the vehicle. Obviously, most of the minimum weights shown in this record and set forth in the appendix hereto are in excess of the loading capacities of the vehicles used, and they presumably are applied in connection with several shipments rather than a single one. This record contains no evidence from a cost, transportation, or other standpoint tending to justify a lower rate per unit on several truckloads than on a single truckload. It is clear that the effect is to prefer unduly the large shipper. Such minimum weights are also unreasonable and result in unjust discrimination."

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[18] These decisions were reviewed in brief filed by this intervener with the Commission.

In *Iron and Steel from Pittsburgh and Aliquippa to Baltimore*, 21 M.C.C. 791, Division 3, condemned suspended schedules carrying minimum weights for motor carriers reflecting the carload rate basis of the railroads (which the Commission had fixed in the *Iron and Steel* case, 155 I.C.C. 517), and in reaching its conclusion said:

> "A truckload minimum weight is generally understood to be the quantity which a carrier can transport in a single vehicle, *Stoves-Alabama and Tennessee-Interstate Points*, 4 M. C. C. 641. Motor carriers should not establish minimum weights which exceed the capacity of the equipment ordinarily used in their transportation. *New England Motor Carrier Rates*, 21 M. C. C. 373."

In *Paper from Mechanic Falls to Boston*, 28 M.C.C. 196, Division 2, quoted with approval *Iron and Steel from Pittsburgh and Aliquippa*, *supra*, and condemned proposed truckload minimum weight of 40,000 pounds to govern reduced commodity rates on printing, wrapping, and newsprint paper.

In deciding the series of general *Ex Parte* MC cases[19] in which it endeavored to aid the motor carrier organizations to bring order out of chaos in the general rate structures throughout the various territories east of the Rocky Mountains, Division 5 (Commissioners Eastman, Lee and Rogers) has affirmatively applied the general doctrine that the weights governing minimum rates of motor carriers should be made with regard to the physical conditions of the transportation, especially truck loading capacity and highway limitations. In that group of cases, we find two expressions in *Truck Line Territory Motor Carrier Rates*,

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[19] Motor Carrier Rates in Middle Atlantic States, 4 M.C.C. 68; Central Territory Motor Carrier Rates, 8 M.C.C. 233; Motor Carrier Rates in New England, 8 M.C.C. 287; Trunk Line Territory Motor Carrier Rates, 24 M.C.C. 501.

24 M.C.C. 501, which are in point. First, on p. 578 thereof in discussing *linoleum cement*, the Division said:

> "* * * With respect to the rates proposed subject to a minimum of 36,000 pounds, we have said that minimum weights in excess of the average carrying capacity of equipment now in use is not conducive to economical operation. The proposed rates are not approved."

Second, in connection with truckload commodity rates on *desiccated coconut* the Division said on p. 582:

> "No justification or necessity was offered for the establishment of the less-than-truckload commodity rates or a truckload commodity rate subject to a minimum weight in excess of the carrying capacity of equipment now in use by the majority of carriers. In view of the foregoing, the proposed rates are not approved."

It is true there have been some expressions of the Commission which the organizations of motor carriers have cited as lending support to their proposals of adopting rail carload minimums, as such, to govern truckload rates. The two cases which are cited in the report of Division 3 herein (R. 17 and R. 18), as stressed by respondents in that behalf, are not at all determinative of the principle or policy to govern in such matters but rather illustrative of possible exceptions to what should be the general rule.

First, in *Peanut Butter from Montgomery to Georgia*, 22 M.C.C. 375, Division 2 said at p. 377:

> "Motor carriers should not maintain truckload or volume rates subject to minimum weights greater than they are able to transport in the equipment which they generally have available. There are numerous motor-carrier rates subject to volume minimum weights which exceed the amount which can be transported in the trucks generally used for the transportation of the commodities on which these rates apply. The national motor-freight classification is replete with ratings subject to minimum weights of 40,000, 50,000, and 60,000 pounds. In most States, restrictive

laws prevent the transportation by motor carriers of loads as heavy as 20 to 30 tons in single units of equipment. We have not condemned the minimum weights of motor carriers which can only be transported in more than one vehicle. * * *"

The Division approved a minimum weight of 12,000 pounds on peanut butter as not unlawful, in lieu of previous volume rate subject to minimum weight of 36,000 pounds.

The second case which was cited by counsel for respondent carriers in the underlying proceedings before the Commission in the present matter (R. 17) is the report of the Commission in *Carpets and Carpeting from Official to Southern Territory*, 237 I.C.C. 651. Commissioner Mahaffie filed with that report this laconic expression, p. 658:

> "I concur, except that I find no justification for basing rates on a truck minimum that admittedly cannot be loaded in a truck."

The main decision, written by Commissioner Rogers, dealt with the relationship between the railroad rates and the motor carrier rates and definitely approved a minimum greater than could be loaded on one unit of equipment, 30,000 pounds. This, however, represents a specific action on a particularly isolated item and was with distinct reservation as to the principle, for the Commission said (our italics):

> "*We are not convinced that it would be reasonable* for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, *we are not prepared to say* that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, *would be unlawful*, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading."

The twelfth supplemental report in the general proceeding, *Trunk Line Territory Motor Carrier Rates*, 31 M.C.C. 541, decided January 2, 1942, is illuminating. This modifies the comprehensive minimum rate order entered under the original report, 24 M.C.C. 501, as to some 32 commodity rate items. The new rates apparently represented a parity with competitive railroad rates and there was no recorded opposition to the petition. But the minimum weights approved are lower than the carload weights maintained by the rail carriers, although the motor carrier conference sought approval of volume minimum weights the same as the rail carload minimum weights. The report recites:

> "• • • It is admitted that the proposed minima cannot be transported in one vehicle, and the earnings shown in support of the proposed rates are based on minima of 20,000, 23,000, and 30,000 pounds, weights which are generally capable of being loaded in one vehicle."

Thereupon, Division 5 said in its aforesaid report of January 2, 1942, denying the higher minimum weights:

> "In prior reports herein we have generally approved proposed truckload rates which are the same as, or higher than, the corresponding rail carload rates provided the proposed rates appeared above a reasonable minimum level, although the proposed truckload minimum weights were lower than the corresponding rail carload minimum weights. In other proceedings we have generally held that motor carriers should not maintain minimum weights greater than those which can be loaded in their vehicles. The rates sought, subject to minimum weights which we believe can be loaded in respondents', vehicles, appear to be reasonably compensatory. They are approved subject to such minimum weights."

In the eleventh supplemental report in *New England Motor Carrier Rates*, 21 M.C.C. 373, at p. 396, old Division 5 said:

> "• • • We are of the opinion that motor carriers should

not establish minimum weights which exceed the capacity of the equipment ordinarily used in their transportation. Ten-ton trucks are the largest generally used in the treated territory by common carriers of general commodities. See our original report herein, 8 M. C. C. 287."

On page 384 of the same supplemental report, old Division 5 substituted minimum of 20,000 pounds for proposed minimum of 36,000 pounds on *printing ink*, and said:

"• • • A Motor-carrier witness testified that none of its vehicles could carry the proposed minimum of 36,000 pounds, and that only a small percentage of its equipment could carry as much as 24,000 pounds. The establishment of a minimum weight by a carrier which exceeds the average capacity of its equipment is of doubtful propriety."

On page 396 of the same supplemental report, the Division disallowed minimum weight of 36,000 pounds of *soap and related articles*, and said:

"• • • However, petitioner's witness testified that 36,000 pounds of these commodities could not be transported in one vehicle of the capacity generally used in over-the-road movements. We are of the opinion that motor carriers should not establish minimum weights which exceed the capacity of the equipment ordinarily used in their transportation. Ten-ton trucks are the largest generally used in the treated territory by common carriers of general commodities. See our original report herein, 8 M. C. C. 287."

Later, in the fifteenth supplemental report in the same proceeding, 24 M.C.C. 213, at page 222, in discussing the commodity rates on *latex*, Division 5 said:

"The traffic moved by motor vehicle in 20,000-pound to 22,000-pound shipments, and one motor carrier transported from three to four truckload shipments per week. The maximum-weight laws of the States through which the latex would be carried do not permit the transportation of 40,000 pounds of this article in one vehicle. Ten-ton trucks are the largest generally used in the treated territory by common carriers of general commodities. As we have stated in prior reports herein, minimum truckload weights of mo-

> tor common carriers should not ordinarily exceed the capacity of the equipment generally used in their transportation."

The foregoing decisions dealing with minimums governing motor carrier movements are in general harmony with the principles considered in judging rail carload minimum weights, as will be seen by examination of the reported decisions.

ESTABLISHED PRINCIPLES GOVERNING RAIL CARLOAD MINIMUMS.

The report of Division 3 defines the conditions governing carload minimum weights of railroads by saying the Commission has found repeatedly these should be made "with reference to the loading capacity of their freight cars," and that "minimum weights in excess of the loading possibilities of the rail equipment" have been condemned. (R. 19)

In the later decision by the full Commission, appears this statement (R. 29):

> "The rates and carload minimum weights of rail carriers are fixed with relation to conditions surrounding transportation in rail service. The primary factors considered in fixing carload minimum weights are the loading characteristics of the commodities moving in carload quantities and the necessity for insuring an efficient use of the carriers' equipment. Except in unusual circumstances, such as those presented in the *Molasses case*, minima in excess of the weight which can be loaded in a single car have been condemned."

Examination of the long line of Commission decisions interpreting and applying the Interstate Commerce Act, clearly establishes that it is the duty of the railroads to provide carload minimum weights that are reasonable: that there is naturally a close relationship between the carload minimum weight and the carload rate: that the

minimum weights are and should be fixed in relation to the loading characteristics of the commodity, with some regard to commercial considerations; that in the interest of economical transportation the minimum on carload freight may be as high as the product can be safely and advantageously loaded, considering both the capacity of the car and the needs of the traffic. It has been repeatedly recognized that carload weight minimums may be approved or required which are far below the physical capacity of the cars but dictated by commercial conditions and the needs of the traffic. But the converse has not been held, that carload minimum weights may properly be fixed higher than the loadings permitted by the capacities of the cars.

As to railroad carload traffic, there is a very long line of cases that charges on basis of a minimum weight which cannot be loaded into the car furnished by the carrier shall be condemned and that the carriers should not be permitted to provide arbitrary minimum weights which cannot be loaded in ordinary equipment available for transportation.

In other words, as to railroad transportation, the Commission's rate policy is clearly established that the ceiling for carload minimum weights shall be determined with reference to the loading capacity of the freight cars and that minimum weights are to be condemned which are in excess of the loading possibilities of the rail equipment.[20]

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[20] *J. Rosenbaum Grain Co.* v. *Missouri, K. & T. Ry. Co.*, 15 I. C. C. 499; *Ozark Fruit Growers Assn.* v. *St. Louis & S. F. R. Co.*, 16 I. C. C. 106; *Barnard Co.* v. *C. M. & St. P. Ry. Co.*, 26 I. C. C. 91, 93; *New England Milk Case*, 40 I. C. C. 699; *Arizona Copper Co.* v. *Director General*, 73 I. C. C. 287; *Portland Flouring Mills Co.* v. *N. P. Ry. Co.*, 83 I. C. C. 366; *Wool Rates Investigation*, 1923, 91 I. C. C. 235; *Hollingshead Co* v. *A. A. R. R. Co.*, 140 I. C. C. 497.

It has been said that minimum weights are placed at a figure that will best serve the general public and at the same time insure economical use of equipment, and that they should only be disturbed on a clear showing that they are unsuitable to the particular commodity and generally unsatisfactory to the shipping public as a whole. *United Verde Copper Company* v. *A., T. & S. F. Ry. Co.*, 142 I.C.C. 315.

It has been repeatedly held, as a controlling general principle, that while minimum weights should be high enough to insure a proper utilization of equipment, they should not exceed what can be reasonably and generally loaded. To this has been attached the interesting rider that some leeway should be accorded for commercial conditions, in fixing carload minima, and that the minima fixed should not contemplate or require the loading of all cars to their utmost capacity.[21]

ANALOGY OF VOLUME TRUCK RATES TO TRAINLOAD RAIL RATES.

It has been urged—and the Commission's decision adverts to that argument—that there is a certain analogy between the carrier proposals in the present case and the principles of volume rates reflected in railroad rates limited to *trainload* movements. That analogy, when fully considered, in the light of the Commission's treatment of the subject of trainload rates, furnishes additional reason for condemning the contention herein of the trucking interests for high minimum weights by way of adopting the so-called competitive carload minimums of the railroads.

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[21] *Lumber Carload Minima*, 68 I. C. C. 98; *Minimum Weights on Coal-tar Paving Cement*, 81 I. C. C. 672; *Aluminum Goods Mfg. Co.* v. *A. & V. Ry. Co.*, 92 I. C. C. 346; *Heinz Co.* v. *Director General*, 112 I. C. C. 206; *Theater Chairs to Southwestern Destinations*, 113 I. C. C. 313.

There was considerable discussion during the oral argument[22] before the Commission on May 8, 1943, of the decision in *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I.C.C. 485, in which the full Commission authorized trainload rates to Peoria and Pekin on blackstrap molasses, minimum 1,800 tons or equivalent to 38½ tank carloads. The recitals of this decision clearly indicate its landmark character in overturning, or at least modifying doctrines and precedents of many years' standing. In truth, the Commission was reluctant to yield to compulsion of the facts of competition to approve the trainload rates involved and did so only upon clear showing of real competition, absence of any resulting unjust discrimination in reality, and clearest proof of very substantial economies in trainload movements between the particular points which would justify lower than carload rates.

Superficially, and only superficially, the report in that case might be thought to afford some comfort for the proponents of the so-called truckload rates based on carload minimums involved in this present case, representing adoption by motor carriers of weight limits correspondingly in force on railroads, just as the blackstrap case involved adoption by railroads of the weight minimum reflecting actual water competition. Such superficial impression is readily rejected when one reads the full terms of the majority report and particularly the expressions of the concurring and dissenting Commissioners. The opening sentence of the *conclusions*, p. 502, might be selected by motor carrier counsel as in support of their proposition:

"We find that there is nothing unlawful in the estab-

[22] This discussion is in part reflected in the recitals of the final decision subsequently entered by the Commission, pages 644, 646, R. 27, 30), where the Commission points out the error in the interpretation placed by motor carrier counsel on the *Molasses case* decision.

> lishment of railroad rates on a quantity larger than a car load, when moving as a single shipment, where, as here, they are designed to meet competition from other modes of transport whose unit of transportation is not limited to single carloads, provided a just and reasonable relation in rates as between the larger and smaller quantities of the same traffic is maintained. * * *"

But the *recitals of fact* in the body of the report very definitely distinguish that conclusion from the proper conclusion reached by Division 3 in the present matter; and this the more clearly appears from the concurring opinion of then Chairman Eastman:

> "* * * The record also shows clearly that the railroads can move molasses between the same points in multiple-carload quantities of not less than 1,800 tons at a materially lower cost per 100 pounds than they can move single carloads. The question at issue is whether it is lawful for them to make rates which reflect this inherent advantage in volume shipments in order to complete more effectively and profitably with the existing water transportation. In my judgment it is lawful. * * *"

It would be impossible to suggest (on the record made before the Commission in the present case) that the respondent motor carriers were proposing these linoleum rates governed by railroad carload minima of 30,000 pounds on any facts which even remotely reflect any "inherent advantage in volume shipments," or that the traffic in 30,000 pound lots will move "at a materially lower cost per 100 pounds than they can move single *truckloads*," of 18,000 or 22,000 pounds, substituting the word *truckloads* in this last clause for the word *carloads* in Mr. Eastman's sentence.[23]

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[23] No claim has been made on behalf of respondent motor carriers of any lesser costs or substantial savings in transportation of linoleum in 30,000 pound quantities, as contrasted with lots representing full loading of the trucks.

The dissenting expression of Commissioner Porter, in which Commissioner Lee joined reviewed outstanding cases in which the Commission established "ancient landmarks," protective of the integrity of the whole rate structure for the benefit of ordinary shippers by denying quantity rates which only large shippers or selected communities might really enjoy. That decision certainly supports in basic theory the policy outlined by the Commission in this case as to motor rate matters.

The decision in the trainload blackstrap case was mentioned (as somewhat analogous to motor carrier proposals of adopting carload minimums) in the decision of Division 3, in *Petroleum Products from Bolivar*, to Farmers Valley, 28 M.C.C. 527. At p. 529 the Division said:

> "* * * The rate approved in that proceeding, however, applies on a single consignment of about 38 carloads, tendered to the rail carrier at one time, on one bill of lading, to be transported at one time in a single train. Because of this manner of handling, it was shown that the operating cost per 100 pounds to the rail line is much less than when the commodity is transported in single carloads. No such showing was made herein. The record, on the contrary, indicates that the respondents' cost of operation would be same whether the wax distillate moved in single or multiple truckloads. No good reason appears, therefore, for the establishment of a multiple-truckload minimum weight, and we conclude that the question whether the proposed minimum rate would be lawful should be determined on basis of a truckload minimum of 4,000 gallons."

In that decision proposed minimum of 50,000 gallons per shipment was disapproved, although designed for application by a contract motor carrier.

An interesting and illuminating article by Mr. Elmer A. Smith[24] entitled "A New Price Policy for the Railroads:

[24] The author of this article is Senior General Attorney for the Illinois Central Railroad who conducted the *Molasses case* for the carriers.

Quantity or Multiple-Car Rates," appeared in *I.C.C. Practitioners' Journal* for September, 1940. The author discussed the policy reflected in the blackstrap trainload rate case and the historical background. The opening paragraphs of that article (supported by adequate footnote references, not necessary to reproduce), throws further light on the question we are now discusssing (our italics):

> "When the Interstate Commerce Commission came into existence in 1887, it found that the railroads commonly accorded lower rates to commodities moving in carload lots than to commodities moving in less-than-carload lots. It was even argued in some early cases that any difference in the charges between these two units of shipment resulted in a violation of Section 2 of the Interstate Commerce Act, which prohibits unjust discrimination. *The Commission made it clear,* however, in approving the principle of a lower rate on a carload shipment, that it was not granting any vague concessions to quantity transport, but was *simply according recognition to marked differences in costs* between two sharply distinguishable modes of transport.
>
> "But, although the Commission thus approved the principle that, *because of differences in the cost of service,* rates might properly be lower on carload than on less-than-carload shipments, the Commission set its face in the first year of its existence against the practice of the railroads, then a rather common one, of making lower rates to those who shipped in quantity lots greater than a carload than to those who shipped a carload only of the same commodity. The Commission, in short, refused to approve what may be described as wholesale rates."

In other words, this leading railroad exponent of a new price policy—a new rate-making policy—recognizes in the beginning that there must be marked differences in costs to justify any *wholesale* rates. That element is not present, according to the evidence, in the present case and in the absence of any demonstrated economy, we submit that the Commission is within the law when it holds there should be no approval of volume rates, labelled "truckload" rates, subject to arbitrary minimum weights based on the carload minimums adopted by the competitive mode of transportation, the railroads.

ABSENCE OF VALID REASONS FOR MINIMUM WEIGHT EXCEEDING TRUCK CAPACITY.

The second point in the conclusions of Division 3, quoted above[25] from p. 201 of the report (R. 19), is:

> "The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists."

The soundness of this expression is unquestionable in the light of the numerous decisions to which we have referred above, relating, first to the established principles governing truckload minimums; second, the principles which have been observed in dealing with carload minimum weights of railroads, and, third, by clear analogy to the situation as regards volume rates of railroads, *i. e.*, trainload rates, as exemplified by the *Blackstrap Molasses case, supra.*

In fact, there is not any evidence whatever in this record of any economical feature to justify a lower rate on 30,000 pounds than on the 20,000 pound lot, and there is every implication and assumption of exactly opposite effect. This is accentuated by the fact that the proposed note requiring actual receipt of 30,000 pounds at one time would seem to throw a burden or duty on the initial carrier, which would add substantially to the comparative expense of handling 30,000 pounds on two trucks versus a single lot of 20,000 pounds which could be and would be handled on a single truck, in pick-up service.

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[25] Page 16 *supra.*

THE CONDEMNED 30,000 POUND MINIMUM WAS A VOLUME MINIMUM.

The third sentence of the conclusions previously quoted[26] from p. 201 of the decision (R. 19) reads:

> "Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum."

This sentence inescapably is correct. It was required by the facts established of record and it was dictated by a common sense interpretation of those facts.

THE REPEATED DECISIONS CONCERNING MINIMA CONSTITUTE AN ESTABLISHED DOCTRINE.

In considering the validity of the announcement by the Commission in the orders under review as to the policy which it will follow, intervener suggests the importance to be attached to the foregoing survey of the numerous cases in which the same practical question has been involved.

In case after case wherein the Commission was considering the propriety of motor carrier rates subject to minimum weights higher than any single vehicles could carry, it has gained an experience and acquired knowledge of circumstances, conditions, and proper theories. In repeatedly announcing the doctrine as to volume rates and minimum weights thereon, the rule has become so well established as to become appropriate for adherence in all ordinary similar matters. Accordingly it seems proper that this should be stated and announced as the administrative or rate-making policy, within the Congressional declaration of national policy and entirely in accordance with the rate-making rule laid down in Section 216 (i) of the Act.

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[26] Page 16 *supra*.

CONCLUSION.

Intervener joins in the conclusion expressed in the brief of appellees that the decree and judgment of the District Court should be affirmed.

Chicago, Illinois, December 10, 1943.

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SUPREME COURT OF THE UNITED STATES.

No. 105.—October Term, 1943.

Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carriers Conference, Inc., et al., Appellants,
vs.
The United States of America and Interstate Commerce Commission.

Appeal from the District Court of the United States for the Southern District of New York.

[February 7, 1944.]

Mr. Justice Rutledge delivered the opinion of the Court.

Appellants are motor carrier associations who seek to put into effect proposed rate schedules in order to meet rail competition. The schedules cover transportation of hard surface floor covering, e. g., linoleum, from points in New England and Middle Atlantic states to various destinations in Middle Western states. The Interstate Commerce Commission, three Commissioners dissenting, rejected the schedules. 34 M. C. C. 641. In so doing it upheld the previous conclusion of its Division 3. 31 M. C. C. 193. A three-judge District Court (28 U. S. C. § 47) sustained the Commission's decision. 48 F. Supp. 432. The appeal, under 28 U. S. C. §§ 47a, 345, brings the decree here for review. Eastern-Central is the principal appellant. We think the judgment must be reversed.

When the schedules were filed, the motor carriers' rates on carpeting generally were based on minimum weights varying between 16,000 and 20,000 pounds, roughly approximating a truckload. Below this weight the rate was equivalent to 70 per cent of first class. Above it the rate varied somewhat, in the neighborhood of 45 to 50 per cent of first class. Corresponding rail rates then were 70 per cent of first class for shipments of less than 30,000 pounds (less than carload lots) and 45 per cent for larger shipments. Thus, the differential according to weight was geared in the one case to rail carload capacity and in the other to truckload capacity.[1]

[1] So it was found, in each instance, upon the evidence, and the finding is not disputed. The figures are only approximate; that is, 30,000 pounds represents not an exact carload capacity, since differences in loading characteristics

Conceiving that these structures gave the railroads an undue competitive advantage on larger shipments, appellants proposed specific rates designed to enable them to compete with the railroads for such shipments. They sought to utilize a new minimum weight. The rates tendered were approximately the equivalent of 70 per cent of first class for shipments of less than 20,000 pounds, 47.5 per cent for 20,000 to 30,000 pounds, and 45 per cent for 30,000 pounds or more. The schedules therefore substantially put rail and motor rates on the same plane for less than 20,000 and more than 30,000 pounds; but placed motor rates substantially lower than rail rates for shipments of 20,000 to 30,000 pounds.

Certain western rail carriers protested. Thereupon the proposed rates were made the subject of investigation and suspension proceedings. 49 U. S. C. § 316(d), (g), 49 Stat. 558-560, 54 Stat. 924. Hearings were begun before Division 3. While they were pending appellants agreed to make applicable in connection with their proposed rate, minimum 30,000 pounds, a tariff provision that such shipments "must be received at and transported from the point of origin from one shipper in one day and on one bill of lading."[2] The rail protestants therefore presented no evidence and after the hearing withdrew their protest. While the proceedings were pending the rail carriers also reduced their rates minimum 30,000 pounds to 42.5 per cent of first class.

The hearings continued and appellants presented evidence which showed, among other things, that one motor carrier, Brady Transfer and Storage Company, of Fort Dodge, Iowa, had received "since these rates were suspended, four loads from the Western Trunk Line Territory, instead of 398, and three of those we haven't collected the charges on, because the rate was too high . . ." It appeared too that the eastbound movement consists largely of dairy products, requiring refrigeration. The bulk of the westbound movement is frozen or salted fish.

Division 3 made findings and conclusions first that, based upon the costs proven and comparison with motor carriers' rates on

of commodities and slight differences in carload capacities may make possible loading slightly more or less in a car. Similar, perhaps somewhat wider, variations affect trucks. The findings were that 20,000 pounds reasonably can be viewed as a minimum weight geared to truckload capacity, though in some instances as much as 22,000 or 25,000 pounds actually can be loaded in one vehicle.

[2] Cf. Carpets and Carpeting from Official to Southern Territory, 237 I. C. C. 651; Peanut Butter from Montgomery, Ala., to Georgia, 22 M. C. C. 375.

numerous commodities, the proposed rates 45 per cent were "just and reasonable provided the minimum that is applicable in connection therewith is reasonable." Accordingly it examined the reasons advanced in support of the proposed minimum of 30,000 pounds.

On this, it found in No. M-1445[3] that linoleum shipments which move by rail to the Ohio points generally are consigned to warehouses having rail sidings, while linoleum is tendered to the appellant motor carriers in quantities weighing from 18,000 pounds upward. It found also, and the finding is not questioned, that it is physically impossible to load 30,000 pounds of linoleum into a single unit of equipment operated by appellants. While some of it can transport 25,000 pounds, "the normal trucking load of linoleum approximates 22,000 pounds." Rejecting appellants' contention based on *Carpets and Carpeting from Official to Southern Territory*, 237 I. C. C. 651, the Division stated:

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents [appellants here] have not presented to us a valid reason *from the point of view of economy in transportation or otherwise*, such as we have found to exist in connection with certain trainload movements,[4] why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. *We adopt as a policy* the condemnation *as unreasonable* of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. [Italics supplied.]

The Division then found that, on the record, a reasonable truckload minimum on linoleum is 20,000 pounds and there was no showing of operating economies which would result if the pro-

[3] Two proceedings, Investigation & Suspension Docket No. M-1216 and No. M-1445, were heard separately, but consolidated before the Division.

[4] E. g., Molasses from New Orleans, La., to Peoria and Pekin, Ill., 235 I. C. C. 485.

posed rates were restricted to apply only when 30,000 pounds are tendered. It concluded that the proposed schedules "are just and reasonable and otherwise lawful except to the extent that they propose to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds is unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable." The proposed schedules therefore, to the extent found not just and reasonable, were ordered cancelled "without prejudice to the establishment . . . of truckload rates on linoleum, minimum 20,000 pounds, which are not less than 45 per cent of the corresponding first-class rates." 31 M. C. C. 193.

Thereafter oral argument was had before the full Commission. At this stage the National Industrial Traffic League intervened and supported the Division's position.[5] The Commission affirmed the Division's findings "that the proposed rates 45 and 47.5 per cent of first class are not unjust or unreasonable except to the extent that the proposed rates, 45 per cent of first class, are subject to a minimum of 30,000 pounds." Both rates, it said, "are within the zone of reasonableness." But "the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000 pound lots and be unjustly discriminatory to shippers of 20,000-pound lots." Since at that time the tariffs disclosed appellants' rates were either 45 or 47.5 per cent of first class, minimum 20,000 pounds, no order for the future was made. The Commission, in concluding its discussion, said:

> We are mindful of the fact that we approved certain [motor carrier] rates subject to a minimum weight of 30,000 pounds on linoleum in *Carpets and Carpeting, Official to Southern Territory, supra.* However, our report therein expresses our doubt as to the propriety of establishing a minimum of 30,000 pounds in connection with the proposed column 45 basis because it would require more than one unit of equipment to transport 30,000 pounds. That report was issued over a year ago and now we are convinced that not only were our doubts as expressed therein well founded, *but that for the future we shall follow the policy announced in the prior report herein* with respect to minimum weight in excess of the loading capacity of the equipment customarily used by the motor carriers. [Italics supplied.]

[5] This intervenor did not appear in the District Court, not having notice of the proceedings there until after the argument there. The appearance here is by virtue of an order granting a motion to intervene.

The District Court, sustaining the Commission's findings and decision,[6] held that the extent to which competition should be recognized in arriving at just rates is a matter, within reasonable limits, for the expert judgment of the Commission and that, in exercising its discretion, that body had met the requirements of Section 216(i) of the Motor Carrier Act.[7] 49 U. S. C. § 316(i).

I.

Notwithstanding the apparent difference between the Division and the full Commission, in the former's view that the proposed rate minimum 30,000 pounds is unreasonable and the latter's that it is both unreasonable and unduly discriminatory, the net effect is that the rate is unlawful, as a matter of policy which condemns all volume minimum rates unless it is clearly shown they will operate at costs per 100 pounds less than the costs incurred at reasonable loading capacity rates.

Whether this policy is now intended to apply to all forms of transportation, rail, motor and water, without regard to competitive conditions affecting two or more of them, is not clear from the abbreviated reports made in this case. But their casting of the matter in terms of unqualified policy, dependent only upon proof of the required reduction in operating costs, gives both

[6] The decree dismissed appellants' bill to set aside and enjoin enforcement of the Commission's order of suspension. The court agreed that the proposed rate of 45 per cent, minimum 30,000 pounds, is "a mere adoption on a volume basis of rates for railroad carload lots," having "no relation to the business of the motor carriers," both because there was no showing of any saving in operating costs when carrying more than 20,000 pounds and because there was none that a 45 to 47.5 rate, for anything beyond 20,000 pounds "would not enable them to maintain reasonable competition with the railroads." As to the finding that rates of either 45 or 47.5 per cent, minimum 20,000 pounds, would not in themselves be unreasonable, the court said this "does not negative the finding of an unjust advantage to shippers of 30,000 pound lots in cases where shippers of 20,000 pound lots are not given the same treatment."

[7] The court found that the Commission had met the section's requirements "in that it has given 'due consideration . . . to the inherent advantages of transportation by such carriers, [and] . . . to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service. . . .'" No specific reference was made, however, to the over-all national transportation policy, or its requirements particularly in relation to the Commission's duty "to . . . foster sound economic conditions . . . among the several carriers; to encourage the establishment and maintenance of reasonable charges, . . . without . . . unfair or destructive competitive practices; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail. . . ." Cf. note 13 *infra* and text.

appearance and substance to the view this may be true, if not with respect to all carriers, then certainly with reference to motor carriers. If so the effect will be, as appellants urge, not to make reduction in costs merely one factor, nor indeed even the most important factor, in determining the reasonableness and discriminatory or contrary character of rates. It will be rather to make reduction in costs the exclusive criterion, eliminating all other considerations, including competitive conditions amounting to necessity. That is true, notwithstanding the Commission's report, immediately prior to stating its adoption of the policy announced by the Division, gave expression in an abstract way to a directly contrary principle, namely, "the extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case."[8] The latter statement, taken literally, squarely contradicts the policy unless indeed the statement was intended to qualify it in situations not indicated or contained an implicit limitation from context that the only "facts in each case" which would be material are those which would prove a reduction in costs.

That the purpose was not to qualify the policy seems apparent, not only from the latter's unqualified formulation and adoption and from the failure to intimate in what types of situation the qualification might operate, but also from two other considerations. One is that the statement was followed immediately by the broad

[8] The Commission long has recognized that "reference to and . . . consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time" are necessary. 20 I. C. C. 43. Included as pertinent have been such "facts, circumstances, and conditions" as the expense attributable to the character of the commodity, e. g., whether it is subject to special risks or requires special services, cf. Interstate Commerce Commission *v.* Chicago, G. W. Ry., 209 U. S. 108; 113 I. C. C. 389; 87 I. C. C. 711, or its transportation character is affected by the manner of packing, 98 I. C. C. 166; the value of the service rendered and of the commodity, e. g., 83 I. C. C. 334; 100 I. C. C. 471; 102 I. C. C. 325; cf. Interstate Commerce Commission *v.* Delaware L. & W. R. R., 64 Fed. 723 (C. C. N. D. N. Y.); the possibility of securing continuous business or additional tonnage, Interstate Commerce Commission *v.* Baltimore & Ohio R. R., 145 U. S. 263; peculiar needs or conditions affecting specific areas, 9 I. C. C. 318; 113 I. C. C. 389; 146 I. C. C. 419; cf. Texas & Pac. Ry. *v.* Interstate Commerce Commission, 162 U. S. 197; rates on the same or similar commodities elsewhere, 113 I. C. C. 389; 122 I. C. C. 235; and the need to meet competition, either by the same or other type of carrier, Interstate Commerce Commission *v.* Texas & Pac. Ry., 162 U. S. 197; Interstate Commerce Commission *v.* Alabama Midland Ry., 168 U. S. 144; Texas & Pac. Ry. *v.* United States, 289 U. S. 627; Interstate Commerce Commission *v.* Illinois Central R. R., 263 U. S. 515; Mississippi Valley Barge Line Co. *v.* United States, 292 U. S. 282; Barringer *v.* United States, 319 U. S. 1. See also 142 I. C. C. 121; 235 I. C. C. 485; 235 I. C. C. 723; 237 I. C. C. 651.

and conclusive declaration, in general terms, without supporting data or reasons, except as supplied by the policy itself, that "the competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination." The statement was not limited to the particular competitive situation. In terms it applied to all between rail carriers and motor carriers. In short, the policy, and therefore the single factor that there was no evidence to show reduction in cost, was the sole criterion of decision. Other facts, including competitive disadvantage, became irrelevant. And the significance of the policy's application becomes more manifest by virtue of the fact that the case, though presented and decided on its own record, was regarded and determined as a test case.[9] Finally, the Commission's review of its previous decisions, upon which appellants relied, shows, we think, that its purpose, in the case of motor carriers at any rate, is to adhere strictly to the policy and, in the manner made, may be taken to indicate that it contemplates no departure whatever. If so, the effect of the decision is not merely to adopt "a policy of administration," as the Commission and the intervenors before it assert; but is rather to adopt, as a rule of law, the principle that only upon a showing of reduction in operating costs may a volume minimum rate be found reasonable and not unduly discriminatory.

II.

The Commission considered chiefly previous decisions in *Carpets and Carpeting from Official to Southern Territory, supra*; *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 485; and *Petroleum Rail Shippers' Ass'n* v. *Alton and S. R. R.*, 243 I. C. C. 589. In the *Molasses* case, notwithstanding the Commission's previous refusal to authorize rail volume rates for more than carload lots at less than carload rates, it approved a multiple car rate, minimum 1,800 tons, on molasses which was lower than the carload rate. The effect was to authorize a lower rate to a number of carloads tendered as a single shipment. The

[9] The brief of the National Industrial Traffic League, intervenor, points out that appellants and other carrier associations joined in a petition to the Commission for reargument and reconsideration of eleven cases previously decided by Divisions 2 and 3, including the one presently involved, I. and S. No. M-1216. The petition was rejected, since the petitioners were not parties of record to all the proceedings. But coincidentally the Commission reopened I. and S. No. M-1216, for oral argument.

departure was made to enable the rail carriers to meet water competition. However, there was a showing that in the circumstances a material saving in costs per 100 pounds would be made in transporting such multiple-car shipments. In the *Petroleum Shippers* case the Commission considered authorizing multiple-car rates on petroleum, but declined to do so upon finding that the record did not establish existence of a substantial cost saving in such shipments.

In the *Carpets and Carpeting* case the Commission approved certain rates subject to a minimum weight of 30,000 pounds on linoleum. In doing so, it said:

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading. 237 I. C. C. 651, 657-658.

And in *Peanut Butter from Montgomery, Ala., to Georgia*, 22 M. C. C. 375, Division 2, although declaring in one breath that motor carriers should not maintain volume rates subject to minimum weights greater than equipment generally available can transport, in the next noted that the national motor-freight classification is replete with such ratings, refused to condemn them and said that if they were restricted to apply only when tendered by one shipper, in one day and on one bill of lading, they would be "in consonance with *Carpets and Carpeting from Official to Southern Territory, supra.*"

III.

These cases disclose departures, though tentatively made, from the Commission's long-standing[10] policy in the same respect, adopted when its powers extended only to rail carriers. Influ-

[10] E. g., Paine Bros. & Co. *v.* Lehigh Valley R. R., 7 I. C. C. 218; Anaconda Copper Mining Co. *v.* Chicago & E. R. R., 19 I. C. C. 592, 596; Richards *v.* Atlantic Coastline, 23 I. C. C. 239, 240; Woodward Bennett Co. *v.* St. Paul, L. A. & St. L. R. R., 29 I. C. C. 664, 665; J. W. Dells Lumber Co. *v.* Chicago, M. & St. P. Ry., 38 I. C. C. 464, 465; and compare Seofield *v.* Lake Shore & Michigan So. Ry., 2 I. C. C. 90.

enced primarily by the desire to secure shipping advantages for the small shipper equal to those given the large one and thus to enforce the policy of the interstate commerce legislation against undue discrimination, the Commission at first declined to adopt wholesale rates.[11] The major departure was in allowing lower rates for carload lots than for less-than-carload shipments. This was justified by the difference in costs. Accordingly, the structure became fixed with this as the major and for long the only differential; and with it the principle that such a saving in operations alone justifies a differential. That policy received judicial approval[12] and remained controlling so long as the Commission had authority only over railroads.

But with the evolution of other forms of carriage, particularly motor carriage, and the Commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy, as declared by the later legislation.[13] This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the

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[11] See note 10 *supra*.

[12] Compare Interstate Commerce Commission *v.* Delaware, L. & W. R. R., 220 U. S. 235, 240-241.

[13] Motor Carrier Act of 1935, 49 Stat. 543; Transportation Act of 1940, 54 Stat. 899.

That policy demands that all modes of transportation subject to the provisions of the Interstate Commerce Act be so regulated as, in the statute's language, to "recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and *foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, *without* unjust discriminations, undue preferences or advantages, or unfair or *destructive competitive practices;* . . . all to the end of *developing, coordinating, and preserving a national transportation system by water, highway, and rail,* as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899. [Italics added.] Cf. McLean Trucking Co. *v.* United States, No. 31, decided January 17, 1944.

inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage.

Necessarily the impact of these changes brought problems the Commission previously had not faced. Necessarily too the Commission in facing them, including those of adjustment among the various forms of transportation, called upon its previous experience in the railroad field for guidance to its judgment. But that experience could not apply fully to the other and different forms of carriage. Nor could it do so always when the interests of two or more were found in conflict. Each form of transportation presents, by reason of its peculiar operating conditions, its own problems for the function of rate making. And each, by virtue of competition with others, presents additional complications arising from the varied circumstances of their operation. Hence, in such situations, principles previously established for application within a single form of transportation cannot always be transplanted to control its relations with another or those of both with the public generally, without consequences unduly harmful to one or to the public interest.

Thus, in the problem presented by this case, application of the principle that volume minimum rates will be allowed only when geared to a capacity loading which makes possible a real saving in costs of operation, may be made within either the railroad area or the motor area without substantial disturbance or difficulty. Each has its unit of carriage or loading and that unit has a substantial relation to costs; hence, upon the long-established railroad principle, to reasonableness and the discriminatory or nondiscriminatory character of rates. But, as between rails and motors, the two units are different. And the two forms of carriage compete, unless the lower rates geared to the respective units are of a character that each forces the other form of carriage from the field. The junction of difference in available units, with rates geared to them, and the fact of competition or competitive possibility produces or may produce consequences neither the character of the unit nor the fact of competition, nor both together, could create in either form of service taken alone. In short, the very fact a rail carload is 30,000 pounds and a truckload 20,000, with rates respectively tied to these weights, may make a life-or-death difference in the competitive struggle, with consequences

affecting not only the carriers but the public interest as well. And appellants' argument that a 30,000-pound minimum is necessary to meet rail competition is at least consonant with the frequent recognition, both by the Commission and by this Court, that there are occasions when it is appropriate for the former to consider a carriers' need to meet other carriers' competition as a factor justifying what otherwise would be an unreasonable or an unduly discriminatory rate.[14]

But whether and to what extent competition may have destructive effect, or other consequences hurtful to the public interest, in a particular situation may depend not merely on the difference in sizes of units, but on other factors. Each form of carriage has some inherent advantages over the others, such as mobility, speed, normal volume capacity, etc. Purely legal restrictions, such as limitations upon tonnage placed on trucks by state laws, create like or contrary effects. Whether, in a particular situation, the mere difference in loading capacity or some other or others of the many important factors affecting competitive position will be controlling depends upon the character of, and the factors involved in, that situation. And this is as true of one form of transportation as of another when, but for rate structures geared solely to costs of operation, it comes within a competitive tangent.

IV.

In such a situation, therefore, to tie rate differentials exclusively to minimum weights based on available unit size conceivably might allocate all shipments of that size to the form of transportation to which it appertains. Or, if the effect were less extensive, still it might impose conditions upon the competition unduly burdensome or not required by the competitive situation and the applicable statutory policies. Thus, appellants say the Commission's ruling has such consequences in this case, namely, to force them to make the 45 per cent rate available on shipments between 20,000 and 30,000 pounds, thus placing the railroads at a disadvantage on such tonnages and compelling the motor carriers to reduce their rates on them below what the competition requires; or to compel them to forego an equality of rate with the railroads on shipments of 30,000 pounds and more by charging only the

[14] Cf. note 8 *supra*.

one rate of 47.5 per cent on all shipments of 20,000 pounds and more. From these alternatives it is charged the consequence is to force the truckers "out of that very large field of traffic" and allocate it to the railroads. Whether this is the effect or not, we have no means of knowing on this record. Nor can we tell, other than by sheer acceptance of the Commission's conclusion, in the form of its statement of the result and cryptic formulation of the policy on which it is rested, whether the proposed rates will give the motor carriers an undue competitive advantage as to shipments of 20,000 to 30,000 pounds, whether there will be discrimination in fact between classes of shippers, or whether though these things may result in the particular situation they will do so only by virtue of its peculiar features or by virtue of its conformity to conditions generally prevailing in regions competitive as between rail and motor carriers.

These, and other questions of like import, remain unanswered upon the record. The problem is novel. It is not free from complexity, as appears from the Commission's hesitant departures from, then its return to, the long-established railroad rule, in inter-carrier situations. Further, the matter is one of general importance. It affects not only shipments of linoleum, and motor carriers, but many kinds of shipment and all kinds of carriers within the Commission's jurisdiction. It may touch vitally the public interest. It involves, to some extent, the important task of reconciling previously established railroad policies with, or adapting them to, the requirements of the presently effective National Transportation Policy and its application to a coordinated transportation system. Upon a matter of such consequence and complexity, our function in review cannot be performed without further foundation than has been made.

We do not mean by this to imply that the result the Commission has reached would not be sustained if a sufficient basis were supplied in the record. We do not undertake to determine what result the Commission should reach. But we cannot say the one at which it has arrived has the sanction of law without further basis than we now have. This in itself requires reversal. Consequently we need not speak concerning appellants' other contentions, except insofar as the pertinence of some of them to the necessary further proceedings requires.

V.

Appellants' broadest contention must be rejected at this stage. It is, in effect, that as a matter of law, in the particular circumstances competitive necessity becomes the controlling consideration, and costs of operation, that is the requirement that minimum volume rates be geared to loading capacity, become immaterial. That view must be rejected for the same reason as requires rejection, on this record and until further buttressed, of the Commission's converse view that costs exclusively control and competition becomes immaterial. Conceivably particular circumstances might make one or the other factor predominant and, in such a situation, the choice would be for the Commission to make, upon a proper weighing of the facts and opposing policies possibly applicable. Whether in any case this contention of appellant could be accepted may be doubtful. Certainly it should not be in advance of further action by the Commission and then only in circumstances which would justify it as being in the public interest so clearly that no other view would be tenable.

Appellants also say that as a matter of law there could be no unjust discrimination in the present circumstances, since they insist there is no showing, upon the facts, that different classes of shippers would be affected. On the contrary they assert that all shippers actually are in the same class and all are free to avail themselves of the alternative rates above 20,000 and 30,000 pounds, 47.5 per cent and 45 per cent, respectively, as they please. But the only bases for this assertion are, first, the absence of any finding that the availability of the 45 per cent rate, minimum 30,000 pounds, "would in practical effect be confined to only a few or a particular class of shippers" and the further assertion that no such finding could be made, since 30,000-pound shipments of linoleum "are the normal units of quantity purchase and sale as revealed by the railroad carload rates which apply between the same localities only on shipments of 30,000 pounds." Obviously, as the Commission noted, the mere existence of these rates in the tariffs hardly could be taken to prove the conclusion appellants sought to draw from that fact. Certainly it could not be taken as conclusive evidence. Whether or not, however, the proposed rates in fact would operate to create an undue discrimination between shippers, or classes of them, is a

matter upon which the record factually throws no light. It is therefore one for further examination by the Commission.

In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does. Cf. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489. Observance of this requirement is as necessary when an established policy is being extended to new and significant situations as when a new policy is being formulated and applied in the first instance. We do not undertake to tell the Comission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours.

The judgment is

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 105.—October Term, 1943.

Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carrier Conference, Inc., and Central States Motor Freight Bureau, Inc., Appellants,
vs.
The United States of America and Interstate Commerce Commission.

Appeal from the District Court of the United States for the Southern District of New York.

[February 7, 1944.]

Mr. Justice Frankfurter, with whom the Chief Justice and Mr. Justice Reed concur, dissenting.

This case in its essentials can be reduced to simple terms; in effect, the question is whether the Interstate Commerce Commission acted unlawfully in holding unreasonable and discriminatory a proposed schedule of rates for the shipment of linoleum in trucks operated by members of appellants, associations of motor carriers. The facts are these. On linoleum shipments between points in New England, New Jersey, Delaware, Pennsylvania, and New York, and destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota, the members of the Eastern Central Motor Carriers Association charged 50% of first-class rates, minimum 20,000 pounds.[1] This minimum is approximately the weight which conventionally is a truck-load. Railroad rates on linoleum at this time were 70% of first-class for shipments of less than 30,000 pounds and 45% of first-class for those weighing at least 30,000 pounds—a conventional railroad carload.

By schedules filed to become effective August 24th, 1940, Eastern proposed rates of 47.5% of first-class, minimum 20,000 pounds, and 45% of first-class, minimum 30,000 pounds. The practical

[1] "First-class" is used to designate the rates applied to a class of commodities. Percentages of a class rate are used as rates for designated commodities.

effect of this change would be to require a shipper who could send only 20,000 pounds of linoleum to pay a higher rate than one who could ship a consignment of 20,000 and 10,000 pounds. And two shippers, one with 10,000 pounds and the other with 20,000 pounds could combine their shipments at the lower rate, while a shipper of 10,000 pounds who could not conveniently join with others would have to pay the higher rate. These are the changes here in controversy. Upon the protest of the western trunk line rail carriers, later withdrawn when the appellants agreed that their 30,000 pound minimum rate would apply only on shipments "received at and transported from the point of origin, from one shipper in one day and on one bill of lading", operation of the proposed schedules was suspended and Division 3 of the Commission held hearings to determine their validity. Upon their conclusion, Division 3 found that the proposed rates were reasonably compensatory, but that it was physically impossible to load 30,000 pounds of linoleum into a single unit of equipment, and that there was no showing that operating economies result when a 30,000 pound minimum shipment involving a truckload and fraction of another truckload is tendered. The Division thereupon concluded that a minimum weight greater than a truckload is unreasonable unless such a rate is justified by savings in cost, and ordered the proposed schedules cancelled to the extent found unjust and unreasonable. 31 M. C. C. 193.

This decision was fully reviewed by the entire Commission upon oral and printed arguments by the motor carriers, the linoleum shippers, and the National Industrial Traffic League, a group organized to promote the free interchange of commerce. The shippers and the Traffic League urged the Commission to leave the order of Division 3 undisturbed, while the motor carriers sought to justify the rates as legitimate means of meeting rail competition. The Commission agreed with Division 3 that the rates were unreasonable and held that the 30,000 pound minimum, based on no difference in transportation cost, would be discriminatory. 34 M. C. C. 641.

If the sole issue were whether there would be discrimination in favor of the 30,000 pound lot shipper as against the 20,000 pound lot shipper, clearly the Commission could find as it did, and the court below properly did not undo what the Commission did. 48 F. Supp. 432. Is there in fact more? The appellants contend

that rail competition excuses and legalizes the discrimination beyond the Commission's power to condemn. This Court does not yield to this claim, but it does hold that either the Commission must state with particularity why the evidence of competitive conditions in this record is so vague and inadequate as to afford no justification for discrimination, or, in effect, requires the Commission to proceed with a full-dress investigation of the entire competitive relations between motor and rail carriers.

The Commission, on the basis of the evidence before it, concluded that "The competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination". Prior decisions of this Court surely do not require greater explication of the reasons on which the Commission's conclusions are based. See *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86-87; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464-465. The Commission did not adopt an inflexible "principle that volume minimum rates will be allowed only when geared to a capacity loading which makes possible a real saving in costs of operation", if its statement that "The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case" is to be accepted. Burke has said somewhere that he could not imagine English law without the law reports. Substantially the same considerations that call for giving reasons in rendering judicial decisions apply to the determinations of such agencies as the Interstate Commerce Commission. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." See *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 511. But we should not be more exacting of reports of the Interstate Commerce Commission explaining its orders than we are of the opinions of lower courts whose judgments come before us for review.

Nothing in this record calls for more explicitness than is ordinarily demanded. For nothing in the record requires the Commission to discuss the conceivable validity of proposed schedules which, aside from competitive conditions, are manifestly discriminatory. Such discriminatory rates were supported by a bare recital that railroad rates were nominally lower than motor carrier

rates and that the business of one motor carrier had decreased. At the hearing before the Division, a representative of one motor carrier stated that the proposed rates were more than adequate to cover costs, that they did not vary substantially from rates imposed on the shipment of other comparable commodities, and that railroad competition had caused his company's linoleum business to decline. He also testified that his firm competed for linoleum shipments with other motor-carriers. This is the proposed justification for a rate differential concededly based on no difference in transportation cost or in service rendered and which therefore discriminates between those who ship 30,000 pound lots and those who ship 20,000 pound lots. And the record becomes even more barren when it is noted that the competitive conditions said to require adoption of the proposed discriminatory tariffs were not such as to prevent the rail carriers' acquiescence in the adoption of the new schedule when, on appellants' theory, the rail carriers had advantages intended to be mitigated by the new rates. The Commission found that either 47.5% or 45% was an allowable rate for either a 30,000 or 20,000 pound shipment—either rate "was within the zone of reasonableness". It thereby permitted the motor carriers to compete on an entire equality with the rail carriers. But it forbade discrimination as between linoleum shippers equally placed. What the appellants really complain of is not that they cannot meet the railroad competition at the 45% rate on 30,000 pound lots, but that they cannot do so and yet collect 47.5% on lots of 20,000 pounds which are outside rail competition. Be that as it may, a mere arithmetic difference between railroad rates and motor carrier rates is quite blind. The rates themselves may not be at all revealing on competitive conditions; they may not tell what a shipper gets for his money and what he [redacted] for. That is, the quality of the service, the advantages of one type of service over the other, the availability of equipment, safety, labor cost, and many other factors may all give significance to the figures that figures themselves do not give.

The present ruling apparently imposes upon the Commission the duty of pursuing such complicated and far-reaching investigations every time a motor carrier rate that may have a relation to a railroad rate is found to be discriminatory in relation to another motor carrier rate affecting the same commodity. Such an investigation is an undertaking of vast scope involving con-

sideration of factors which it would require an expert merely to catalogue. The different characteristics of rail and motor carrier services, the economic wisdom of excluding motor carriers from large-bulk linoleum trade or limiting their participation in such trade, the availability of other commodity shipments to replace linoleum trade diverted to rail carriers, the availability of and cost of transporting commodities which might be used to fill the truck only partially loaded with linoleum—these are only a few of the factors which may become relevant. Compare III-B Sharfman, *The Interstate Commerce Commission*, pp. 572 *et seq.* The appellants introduced no evidence on the basis of which the Commission could intelligently weigh these considerations. To hold that the Commission must on its own initiative embark on such an investigation in a proceeding of this nature is to impose what may well be a crippling burden.

To speak more particularly of the task which the Commission now faces, it should be noted that Eastern files tariffs with the Commission for about 650 carrier members. A typical commodities clause from the carriers' certificates of public convenience and necessity provides for the shipment of "*General commodities*, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, over regular routes . . . ." Thus it appears that the exceptions are few and the allowable shipments many. An investigation of the scope apparently required by the Court would entail a detailed study of the relations of the rate structures in a case merely involving the rates on specific commodities one to the other. If rail competition turns out to be actually detrimental to the successful operation of appellants' linoleum business, the war-time load on the railroads might become relevant, and the Commission might have to decide whether the atypical circumstances at this time justify competitive discriminatory rates which might otherwise be unreasonable.

That the Commission is an expert body to which Congress has seen fit to commit the regulation of the intricate relationships between the various means of national transportation is a well-worn phrase which ought not to lose its significance in practice when the actions of the Commission come here for review. We should be very reluctant to define for the Commission the occasions which

appropriately demand investigations of general transportation problems, and more particularly when a contest over the rate on a particular commodity included in a network of tariffs calls for such a general investigation. Surely it is within the special competence of the Commission to put on a discriminating carrier the duty of justifying by proof his plain discrimination as to a particular rate and not permit him to compel the Commission by a mere assertion to embark upon a far-flung inquiry. There are undoubtedly occasions when the Interstate Commerce Commission will undertake such an investigation in the public interest. But it ought not to be compelled to do so upon the occurrence, from an administrative point of view, of a more or less accidental filing of a tariff revision. When the carrier seeks to supplant a lawful rate, as is the case here, the burden is on it to supply all the essential information to justify the proposed new rate. § 216(g), Part II of the Interstate Commerce Act, 49 U. S. C. § 316(g). If it does not do so, it has failed to sustain the duty cast upon it by law, and the Commission in so finding has duly exercised its authority. The Commission's disposition of *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 985 and *Petroleum Shippers' Ass'n* v. *Alton S. R. R.*, 243 I. C. C. 589, are entirely consistent, so far as that is relevant, with its order in this case.